

## **Kansas Open Records Act (KORA) Guidelines**

**Revision Date: July 1, 2015**

### **I. PURPOSE AND CONSTRUCTION**

- A. It is the public policy of Kansas that “public records shall be open for inspection by any person unless otherwise provided, and this act shall be liberally construed and applied to promote such policy.” K.S.A. 45-216(a); *see also Cypress Media, Inc. v. City of Overland Park*, 268 Kan. 407, Syl. ¶ 3 (2000).

### **II. PUBLIC AGENCIES SUBJECT TO KORA**

- A. K.S.A. 2014 Supp. 45-217(f)(1) defines a “public agency.”
  - 1. The state or any political or taxing subdivision or the state, or any office, officer, agency or instrumentality thereof or any other entity
  - 2. Receiving or expending or supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state.
- B. “Public agency” does not include:
  - 1. Any entity solely because it receives public funds in exchange for goods or services. K.S.A. 2014 Supp. 45-217(f)(2)(A).
    - a. Receipt of public funds may subject the financial records of a not-for-profit vendor to the KORA if they fall under the provisions of K.S.A. 2014 Supp. 45-240. AGO 2004-34.
  - 2. Judges. K.S.A. 2014 Supp. 45-217(f)(2)(B).
    - a. A judge’s telephone records do not become public merely because another branch of government’s data processing facilities maintains the records for the judicial branch. AGO 96-77.
    - b. KORA, by its express terms, applies to court records. KORA allows judicial branch to make its own rules by Supreme Court rule. K.S.A. 2014 Supp. 45-221(a)(1).
    - c. District courts probably have authority to close some records under certain circumstances. *Stephens v. Van Arsdale*, 227 Kan. 676 (1980) (discussing prior law).

3. “Any officer or employee” of the state or political or taxing subdivision of the state if state or political/taxing subdivision does not provide “an office which is open to the public at least 35 hours per week.” K.S.A. 2014 Supp. 45-217(f)(2)(C).
    - a. “This exclusion applies only to the part time officials personally and not the governmental entity they serve.” Frederickson, *Letting the Sunshine In*, 33 Kan. L. Rev. 205, 219-20 (Winter, 1985).
    - b. Offices that do not have regular office hours must establish reasonable hours when persons may inspect and copy documents, but such offices may require 24 hours advance notice. K.S.A. 2014 Supp. 45-220(d).
      - 1) For this provision to have any meaning, the 35 hour per week exclusion of K.S.A. 2014 Supp. 45-217(f)(2)(C) must not apply to the office, but rather only to individuals, officers or employees working in such offices.
  4. State employees who utilize a private electronic device and do not utilize public resources to send email from his or her private email account (private email) are not a “public agency” as defined by K.S.A. 2014 Supp. 45-217(f); accordingly, their private emails are not records subject to the provisions of the KORA. AGO 2015-10.
- C. Private entities – Although most private entities are not subject to KORA, some nonprofit corporations may be included:
1. Nonprofit entities subject to KORA if they perform traditional governmental functions:
    - a. Nonprofit providing mental health services is subject because there is specific statutory authorization for contracts with such nonprofits and in such a capacity it is performing a traditional governmental function. AGO 94-111.
    - b. Nonprofit city hospital subject to KORA because authorized by statute and created by city. AGO 88-61.
  2. KORA requirements for financial records of nonprofit entities.
    - a. KORA applicable to financial documents of non-profit entities that receive public funds in an aggregated amount of \$350 or more a year unless otherwise exempted. K.S.A. 2014 Supp. 45-240.

- 1) “Public funds’ means any moneys received from the United States, the state of Kansas or any political or taxing subdivision thereof, or any officer, board, commission or agency thereof.” K.S.A. 2014 Supp. 45-240(e)(2).
  - 2) These provisions do not apply to any health care providers, individuals, for profit corporations or partnership. K.S.A. 2014 Supp. 45-240(d).
- b. Examples of nonprofits that are not subject to the KORA:
- 1) NCAA not subject to KORA because member schools pay dues in exchange for services. AGO 97-64.
  - 2) WSU Endowment Assn. AGO 82-172 (discussing prior law).
  - 3) Sheltered Living, Inc. AGO 04-34 (privately formed non-profit providing services to special population, heavily regulated, funding from various public entities; however, no direct government entity oversight or control).

### **III. GENERAL PROCEDURAL ASPECTS OF KORA**

- A. Public agency must adopt procedures to be followed in requesting access to and obtaining copies of public records. K.S.A. 2014 Supp. 45-220(a). Procedures must:
1. Provide full access to public records.
  2. Protect public records from damage and disorganization.
  3. Prevent excessive disruption of the agency’s essential functions.
  4. Provide assistance and information upon request.
  5. Insure efficient and timely action in response to applications for inspection of public records.
- B. Public agency must designate a local freedom of information officer. K.S.A. 45-226. The officer shall:
1. Prepare and provide educational materials/information concerning KORA.
  2. Assist the agency and the public to respond to inquiries and resolve disputes.

3. Establish the requirements for the content and physical characteristics of a brochure that contains plainly written basic information on public rights as a requester, responsibilities of the public agency, and how to inspect and obtain a copy of records under KORA. Brochure must be prominently displayed, distributed or otherwise made available to the public. K.S.A. 45-226 and 45-227.
- C. Upon request, public agency shall provide office hours, name/title of custodian(s) of record, fees, and procedures for obtaining copies or inspecting records. K.S.A. 2014 Supp. 45-220(f).
  - D. Any person may inspect during regular office hours and any established additional hours. K.S.A. 45-218(b).
    1. The person need not be a resident to inspect or request copies of records. K.S.A. 45-218 and K.S.A. 2014 Supp. 45-219. *But see McBurney v. Young*, 133 S.Ct. 1709 (2013), 2013 WL 1788080 (not a violation of privileges and immunities clause to limit access to public records to citizens of Commonwealth of Virginia).
  - E. Public agency that does not have regular office hours shall establish reasonable hours when persons may inspect records.
    1. Public agency without regular office hours may require 24 hour notice of desire to inspect. Notice shall not be required to be in writing. K.S.A. 2014 Supp. 45-220(d).
  - F. Public agency must have an official custodian of records who is responsible for maintaining public records, regardless of whether such records are in custodian's actual personal custody or control. K.S.A. 2014 Supp. 45-217(e).
    1. Custodian may designate other persons to carry out custodial duties. K.S.A. 2014 Supp. 45-217(e) and 45-220(e); AGO 90-89.

#### **IV. RESPONDING TO A REQUEST**

- A. A public agency:
  1. May require the request to be written, but not on a specific form. K.S.A. 2014 Supp. 45-220(b); AGO 2009-18.
    - a. Purpose of request is to assure clarity concerning records requested.
    - b. Shall only ask for name, address, information necessary to ascertain the records to which requester desires access and the requester's right of access.

- c. May require proof of identity. K.S.A. 2014 Supp. 45-220(b).
2. May request certification that records will not be used in a prohibited manner. The certification may require the requester to certify that he/she:
- a. Has a right of access to the records and the basis for that right, K.S.A. 2014 Supp. 45-220(c)(1); or
  - b. Does not intend to and will not:
    - 1) Use names and addresses contained in or derived from the records/information for the purposes of selling or offering for sale any property or services to any person who resides at any address listed; or
    - 2) Sell, give or otherwise make available to any person any list of names or addresses contained in or derived from the records/information for the purpose of allowing that person to sell or offer for sale any property or services to any person who resides at any address listed. K.S.A. 2014 Supp. 45-220(c)(2); *see also* K.S.A. 2014 Supp. 45-230; AGO 2009-18; 87-137.
  - c. Certification provision applies to the names/addresses individuals and businesses listed in the public records. AGO 87-73.
  - d. Certification cannot be required as a prerequisite to access records if the requested records do not contain a list of names/addresses and such cannot be derived from the records. AGO 2009-18.
  - e. Not all commercial use of records is prohibited. AGO 98-51.
    - 1) Group of local ministers may use lists from public records to provide information about area churches. AGO 2000-35.
    - 2) Public agency may use its own records to contact and inform those listed of its own services or programs. AGO 2006-26.
    - 3) Provision does not prohibit use of lists of names obtained from public records to solicit the purchase of property from the persons listed. AGO 96-68 (water meters); 98-55 (offer to purchase right to receive payments on underlying contract for deed).
    - 4) Using information from tax rolls to produce land “ownership maps” not prohibited; names/addresses not used to solicit

but rather for informational purposes to determine land ownership and location. AGO 86-39.

5) Information from county assessment, appraisal, tax records and maps to produce “microfiche ownership products and maps” not prohibited; names/addresses not used to solicit, but rather to produce an item with the same information that is available to the public. AGO 89-47.

f. Liability – custodian who relies in good faith on certification from requester relieved of liability if records improperly used. AGO 94-132.

g. Cannot circumvent certification provision indirectly; a third party who obtains this information from a ‘requester’ violates the law if it is used for commercial purposes; can decline to provide records requested if custodian knows the requester intends to use list for commercial purpose. AGO 86-1 (newsletter service requested records utility records so that it could compile and sell names/addresses to its subscribers, who would then solicit customers from that list)

B. Public agency shall act on request “as soon as possible,” but not later than the end of the third business day following the date the request was received. K.S.A. 45-218(d).

1. Public agency shall give a detailed explanation for the delay if access is not granted immediately, and provide the earliest time and date that the record(s) will be available. K.S.A. 45-218(d).

2. If request is denied, the custodian shall provide, upon request, a written statement of the grounds for denial. Statement of denial must cite the specific provision of law under which access is denied. K.S.A. 45-218(d).

a. Specificity is required: “The burden of establishing the applicability of an exemption from disclosure under [KORA] requires the party claiming the exemption to provide more than conclusory language, generalized allegations, or mere arguments of counsel. A sufficiently detailed record must be provided to show the reasons why an exemption applies to the materials requested.” *Southwest Anesthesia Associates v. Southwest Medical Center*, 23 K.A.2d 950, Syl. ¶ 2 (1997).

3. Unreasonable burden or disruption to agency. K.S.A. 45-218(e).

a. Public agency may deny access to or inspection of requested records if the request places an unreasonable burden on agency or if custodian has reason to believe repeated requests are intended to disrupt other essential functions of the public agency.

- 1) **CAUTION** – this provision should be used only in extreme circumstances.
  - 2) “Refusal under this subsection must be sustained by a preponderance of evidence.” K.S.A. 45-218(e).
- C. Any person may make abstracts or obtain copies of a public record. K.S.A. 2014 Supp. 45-219(a).
1. Copies of public records shall be made while in the possession, custody and control of custodian or designee where the records are kept. K.S.A. 2014 Supp. 45-219(b).
  2. No person shall remove original copies of public records from the public agency without the written permission of the custodian. K.S.A. 45-218(a).
  3. If copies cannot be made where the records are kept, the custodian “shall allow arrangements to be made for use of other facilities.” Costs shall be paid by the person requesting the records. K.S.A. 2014 Supp. 45-219(b).
  4. Public agency is not required to provide copies of radio or recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations, or similar audio or visual items or devices unless the items were shown or played at a public meeting of the governing body thereof. K.S.A. 2014 Supp. 45-219(a).
    - a. Public agency not required to provide copies of items or devices copyrighted by someone other than the public agency. K.S.A. 2014 Supp. 45-219(a).
      - 1) Must still provide access to the requested records as required under K.S.A. 2014 Supp. 45-220 unless there is an exception to disclosure based on content or nature of item.

## V. FEES

- A. Public agency may prescribe reasonable fees. K.S.A. 2014 Supp. 45-219(c).
1. Fees for copies shall not exceed the actual cost, including the cost of staff time. K.S.A. 2014 Supp. 45-219(c)(1).
    - a. Language contemplates and allows public agency to charge fees for staff time spent in retrieving, reviewing, redacting and preparing the records to be provided to requester.

- b. Fees are not meant to pay for costs that would be incurred by a public agency even without a record request, *e.g.* overhead, capital improvements, utility bills, rent/building payments, etc.
    - 1) Legislature has granted specific exceptions to this rule in order to fund the cost of the development of a database. *See* K.S.A. 74-2022, Electronic databases fee fund; access fees for department of revenue information; disposition of funds.
- 2. Public agency may charge fees for providing access to records maintained on computer facilities, including the cost of any computer services and staff time required to provide access. AGO 93-126.
  - a. Proration of costs of computerizing are precluded, as such costs are normally required even without record requests.
  - b. Public agency not required to acquire or design a special program to produce the information; city has discretion to allow requester to design or provide a computer program to obtain information in desired form. AGO 89-106; *but see* AGO 97-52 (withdrawing portion of AGO 89-106 regarding disclosure of public employees' information).
  - c. Public agency is not required "to electronically make copies of public records available by allowing a person to obtain copies of records by inserting, connecting or otherwise attaching an electronic device provided by such person to the computer or other electronic device of the public agency." K.S.A. 2014 Supp. 45-219(g).
  - d. Public agency may establish proprietary computerized system that allows access to public records on a paid subscription basis; this does not alter the nature of the public record or applicability of KORA; public records accessed through such a system must be made available upon request at a fee not exceeding the actual cost of production. AGO 95-64; *see also* AGO 2009-14 (county may enter contract with private company to provide computer access to county records; contract does not relieve county of KORA obligations).
- 3. Fees may include the reasonable cost of staff time spent in redacting open from closed information. *Data Tree, L.L.C. v. Meek*, 279 Kan. 445 (2005).
- 4. Twenty (\$0.20) cents per page charged by school district not unreasonable as it reflected actual costs. AGO 87-4.
  - a. Other jurisdictions have generally not upheld copying costs in excess of \$0.25 per page.



- B. Public agency may require payment of fees in advance. K.S.A. 45-218(f); K.S.A. 2014 Supp. 45-219(a).
- C. Fees for public agency in the executive branch of state government. K.S.A. 2014 Supp. 45-219(c)(5).
  - 1. Agency head shall establish fees for access to or copies of public records.
  - 2. Requester may appeal reasonableness of the fee(s) charged for providing access to or furnishing copies of such state agency records to the secretary of administration. Secretary's decision is final.
    - a. Fees charged by a state agency under this provision that is equal to or less than \$0.25 per page "shall be deemed a reasonable fee."

## VI. RECORDS SUBJECT TO KORA

- A. Unless closed pursuant to specific legal authority, all records are open for inspection. K.S.A. 45-218(a).
  - 1. Contractual provision attempting to close certain terms is void as against public policy, provided no other closure exemptions apply. AGO 93-55; 91-116.
  - 2. A settlement agreement cannot be closed by the parties, except to the extent that KORA allows closure, *i.e.*, some parts of the agreement may constitute a personnel record, while others may involve a clearly unwarranted invasion of personal privacy. *See* K.S.A. 2014 Supp. 45-221(a)(4) and (30).
  - 3. Any public records in existence more than 70 years shall be open for inspection by any person unless disclosure is specifically prohibited or restricted by federal law, state statute or rule of the Kansas Supreme Court or by a policy adopted pursuant to K.S.A. 72-6214 (right of privacy policies in educational context).
- B. KORA applies to public records, not to private records.
  - 1. "Public record" means any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency. . . ." K.S.A. 2014 Supp. 45-217(g)(1).
    - a. Use of the phrase "regardless of form or characteristics" means that "public records are not restricted to written records." *Burroughs v. Thomas*, 23 Kan.App.2d 769, Syl. ¶ 1 (1997) (holding that autopsy photos are public records).

- b. Computer data is a “record.” *State ex rel. Stephan v. Harder*, 230 Kan. 573, 582 (1982) (considering prior records statute); *see also* AGO 94-104; 89-106; 88-152; and 87-137.
      - 1) Data must be provided in the form requested if the public agency has the capability of producing it in that form.
    - c. Disclosure of Kansas Offender Registration Act information on the internet is allowed under Kansas statutes. *State v. Stevens*, 26 K.A.2d 606 (1999).
- C. KORA does not apply to:
  - 1. Records made, maintained or kept by an individual who is a member of the legislature. K.S.A. 2014 45-217(g)(2).
  - 2. Records made, maintained or kept by an individual who is a member of the governing body of any political or taxing subdivision of the state. K.S.A. 2014 Supp. 45-217(g)(2).
  - 3. Records owned by private person or entity and that are not related to functions, activities, programs or operations funded by public funds. K.S.A. 2014 Supp. 45-217(g)(2).
  - 4. Records not yet in existence.
    - a. A prospective or standing request for “records as they become available” is not enforceable. AGO 98-51.
  - 5. KORA does not require a public agency to create a record in order to respond to requests or in order to answer questions asking for “information.”
    - a. *But see* K.S.A. 2014 Supp. 45-221(d), which requires “redaction” or separation/deletion of open from closed information contained in public records. This may have the practical impact of requiring creation of a new document.

## **VII. RECORDS THAT MAY BE DISCRETIONARILY CLOSED**

- A. A public agency has discretion and may decide whether to make certain types of records available. K.S.A. 2014 Supp. 45-221; AGO 89-107.
  - 1. K.S.A. 2014 Supp. 45-221(a): “Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose. . . .”

2. The burden of showing that a record fits within an exemption to disclosure rests with the party intending to prevent disclosure. *Southwest Anesthesia Serv. v. Southwest Med. Ctr*, 23 K.A.2d 950 (1997).
- B. Records that may be discretionarily closed are set out in K.S.A. 2014 Supp. 45-221(a)(1) through (55).
1. Three general policy reasons records may be closed:
    - a. Personal privacy.
    - b. Safety/security.
    - c. Internal communications while policies are developed or administrative procedures are underway.
- C. Examples of records discretionarily closed based on privacy concerns:
1. Medical, psychiatric, psychological, alcohol or drug treatment records which pertain to identifiable individuals. K.S.A. 2014 Supp. 45-221(a)(3); AGO 2011-05.
  2. Personnel records, performance ratings, or individually identifiable records pertaining to employees or applicants for employment in public agencies. K.S.A. 2014 Supp. 45-221(a)(4); AGO 91-127.
    - a. Exemptions do not apply to nonemployees or to independent contractors. *Southwest Anesthesia Serv. v. Southwest Med. Ctr*, 23 K.A.2d 950 (1997); AGO 99-55 (consultant contract for independent contractor or public employee generally open; information may be redacted if there is a statutory justification).
    - b. Personnel exemption designed to protect information that is normally kept in personnel files, such as documentation of discipline; references and resumes; medical, ADA and FMLA issues; and specific personal information such as home address, bank deposit information, social security number.
    - c. Must make public the “names, positions, salaries or actual compensation employment contracts or employment-related contracts or agreements and lengths of service” of public officers and employees. K.S.A. 2014 Supp. 45-221(a)(4); *see also* AGO 2010-3 (“salary” includes records of payments made to employees for vacation or sick leave; “salary” does not include unpaid accrued vacation and sick leave); 2000-08 (names of members appointed to states boards must be disclosed); 92-132 (pension plan part of salaries); 91-50 (salary deduction not open); 88-61 (names of

employees of public agencies and salaries must be disclosed upon request).

- d. Public employee home addresses may be closed. K.S.A. 2014 Supp. 45-221(a)(4) and (30); *see also* AGO 97-52; *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994) (disclosure of home addresses can be a clearly unwarranted invasion of personal privacy under FOIA).
  - e. Public agency may close identifying information such as photos, home addresses, home telephone numbers and identity of family members of public law enforcement officers; may also close such identifying information of the public LEO. K.S.A. 2014 Supp. 45-221(a)(4) and (30); AGO 2006-08.
  - f. Records pertaining to an internal investigation of an agency's employee, disclosure of which would not interfere with a prospective administrative adjudication or civil litigation nor disclose the identity of a confidential informant, may nevertheless still be discretionarily closed if they fit the definition of a personnel record. K.S.A. 2014 Supp. 45-221(a)(4) and (11); AGO 91-127 (concerning records pertaining to an internal investigation of an agency's employee)
3. Letters of reference or recommendation pertaining to the character or qualification of an identifiable individual, except documents relating to the appointment of persons to fill a vacancy in an elected office. K.S.A. 2014 Supp. 45-221(a)(6).
  4. Library archive and museum materials contributed by private parties may be closed if closure was a condition of donation. K.S.A. 2014 Supp. 45-221(a)(7). Library patron and circulation records which pertain to identifiable individuals may also be closed. K.S.A. 2014 Supp. 45-221(a)(23).
  5. Public records containing information of a personal nature when public disclosure would constitute a clearly unwarranted invasion of personal privacy. K.S.A. 2014 Supp. 45-221(a)(30); AGO 99-55 (independent contractor consulting contract); 98-38 (SSN of victim of sex offense); 92-149 (victim of sex offense); 87-168 (social security number); *see also* K.S.A. 2014 Supp. 75-3520 concerning release of social security numbers.
    - a. "Clearly unwarranted invasion of personal privacy" is a very limited exemption, and often turns upon the circumstances of each individual situation.
    - b. K.S.A. 2014 Supp. 45-217(b) provides that "[C]learly unwarranted invasion of personal privacy' means revealing information that would be highly offensive to a reasonable person, including information that

may pose a risk to a person or property and is not a legitimate concern to the public.”

c. Social Security numbers, mothers’ maiden names and dates of birth contained in public records held by a county register of deeds can be closed to a business information provider. *Data Tree, L.L.C. v. Meeks*, 279 Kan. 445 (2005).

6. Information or material received by register of deeds from military discharge papers (DD-214); may only be released to specific parties, including dischargee, immediate family and lineal descendants; agents/heirs/assigns; licensed funeral director who has custody of body of deceased dischargee; when required by state/federal department, agency or political subdivision; when form required to perfect claim of military service or honorable discharge or claim of a dependent; and upon written approval of commissioner of veterans affairs to a person conducting research. K.S.A. 2014 Supp. 45-221(a)(46).

7. Records that would disclose the name, home address, zip code, email address, phone/cell number, or other contact information for concealed carry licensees, applicants or persons enrolled in or who completed weapons training; records “shall not be disclosed unless otherwise required by law.” K.S.A. 2014 Supp. 45-221(a)(53).

D. Examples of records discretionarily closed based on safety or security concerns:

1. Information that would reveal the identity of any undercover agent or any informant reporting a specific violation of law. K.S.A. 2014 Supp. 45-221(a)(5).

2. Criminal investigation records. K.S.A. 2014 Supp. 45-221(a)(10); 45-217(c) (definition).

a. While criminal investigation records may be discretionarily closed, statute provides criteria for judicial review of decision to close. The factors to be considered in opening the records basically weigh public interest in disclosure vs. harm of disclosure. K.S.A. 2014 Supp. 45-221(a)(10)(A)-(F). Statute requires custodian to, upon request, identify which factor(s) in (A) - (F) are applicable to the record(s) being closed under this exemption.

b. “‘Public interest’ . . . means an interest in a matter affecting a right or expectancy of the community at large. Mere curiosity about the circumstances surrounding an investigation is not sufficient.” *Harris Enterprises, Inc. v. Moore*, 241 Kan. 599 (1987).

- 1) Legislative intent behind criminal investigation records exemption is to protect innocent persons whose names might be involved in an investigation, either as possible suspects or as informants. *Seck v. City of Overland Park*, 29 Kan. App. 2d 256 (2000).
- c. Criminal investigation records does not include police blotter entries, court records, docket sheets, rosters of jail, correctional or detention facility inmates, records pertaining to violations of traffic laws except vehicular homicide. K.S.A. 2014 Supp. 45-217(c); AGO 93-103 (court records of public judicial proceedings); 87-145 (records stating charges filed in municipal court and court dates open); 87-25 (“jail book” listing persons placed in jail and information of a general nature open).
  - 1) If a police department does not maintain a blotter, it is under a common law duty to disclose basic information about arrests reasonably contemporaneously with the arrest. AGO 98-38.
  - d. Custody time is open; because public agencies keep this information in different ways, facts will dictate whether to require, restrict or allow access to or copies of information. AGO 2002-29.
  - e. Standard Offense Report – information on front page except social security number is presumed to be open; may close portions of front page only if victim of sex crime or under unusual event where disclosure would constitute clearly unwarranted invasion of privacy. AGO 98-38; 87-25.
  - f. Standard Arrest Reports are mandatorily closed. AGO 98-38 (arrest report is criminal history record information; *see* K.S.A. 2014 Supp. 22-4701(b)); 87-25.
  - g. Mug shots are criminal investigation records and not required to be open to the public. AGO 87-25.
  - h. A log of breath test machine results is a criminal investigation record and not required to be open. AGO 87-63.
  - i. Coroner reports are subject to disclosure unless they have been filed with the clerk of the district court and designated as a criminal investigation record. K.S.A. 22a-232(b); AGO 86-05.
  - 1) Autopsy reports prepared by coroner and filed with district court are open unless the coroner’s report is designated as

criminal investigation record. *Burroughs v. Thomas*, 23 K.A.2d 769 (1997); K.S.A. 22a-232(b).

- j. Other records of investigations of a death may be closed even if the death turns out to be from natural causes so long as there was initially a criminal investigation. *Seck v. City of Overland Park*, 29 K.A.2d 256 (2000).
- 3. Software programs for electronic data processing and documentation thereof. K.S.A. 2014 Supp. 45-221(a)(16).
    - a. Public agency must maintain a register that describes the information maintained on computer facilities and the form in which the information can be made available using existing computer programs; register is open. K.S.A. 2014 Supp. 45-221(a)(16).
  - 4. Records concerning emergency or security information or procedures. K.S.A. 2014 Supp. 45-221(a)(12) and (45).
    - a. Confidential records or information relating to security measures provided or received under K.S.A. 2014 Supp. 45-221(a)(45) “shall not be subject to subpoena, discovery or other demand in any administrative, criminal or civil action.” K.S.A. 2014 Supp. 45-221(g).
  - 5. May close information that would reveal the location of a shelter or a safehouse or similar place where persons are provided protection from abuse or the name, address, location or other contact information of alleged victims of stalking, domestic violence or sexual assault. K.S.A. 2014 Supp. 45-221(a)(47).
    - a. K.S.A. 75-451 *et seq.* allows victims of domestic violence, sexual assault, trafficking or stalking to obtain a substitute mail address from the Secretary of State’s office for use when responding to record requests.
  - 6. Records of a public agency on a public website searchable by a keyword search and that would identify the home address or home ownership of a law enforcement officer or parole, probation court services or community correctional services officer. K.S.A. 2014 Supp. 45-221(a)(51).
    - a. Individual officer shall file a request to restrict identifying information from public access on the public website with the custodian of records; must be restricted within 10 business days of receipt of request; restriction expires after 5 years; officer may file new request for restrict at any time.

7. **NEW** – Records of a public agency on a public website searchable by a keyword search and that identify the home address or home ownership of a federal judge, supreme court justice, court of appeals judge, district court, magistrate or *municipal* judge, US attorney for Kansas, assistant or *special assistant* US attorney, attorney general, assistant or *special assistant* attorney general, county/district attorney, assistant or *special assistant* county/district attorney, or *city attorney or assistant or special assistant city attorney*. HB 2256, Sec. 10; Approved by Governor – May 22, 2015 (effective on publication in statute book); will become K.S.A. 45-221(a)(52).
    - a. Individual shall file a request to restrict identifying information from public access on the public website with the custodian of records; must be restricted within 10 business days of receipt of request; restriction expires after 5 years; individual may file new request for restriction at any time.
- E. Examples of records discretionarily closed based on internal communications or deliberations:
1. Records which are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure. K.S.A. 2014 Supp. 45-221(a)(2) (includes attorney client privilege; possibly includes trade secrets, K.S.A. 60-432; *but see* AGO 2010-17).
    - a. Attorney billing records are not *per se* closed under attorney client or work product privilege, and thus generally must be disclosed if in the possession of a public agency.
    - b. Narrative statements in attorney billing statements are not *per se* privileged.
      - 1) Create a “privilege log” – parties objecting to disclosure bear the burden of establishing that the privilege applies. To carry the burden, they must describe the documents or information to be protected, state precise reasons for the objection to discovery, and provide sufficient information to enable the court to determine whether each element of the asserted privilege is satisfied. A blanket claim as to the applicability of a privilege does not satisfy the burden of proof. Some details may be closed, but the burden is on the public agency to justify it. *Cypress Media, Inc. v. City of Overland Park*, 268 Kan. 407 (2000); *compare* K.S.A. 60-226(b)(7) and FRCP 26(b)(5) (must expressly make the claim of privilege and describe the contents of items not produced or disclosed in discovery) and K.S.A. 60-245(d)(2) (must expressly make the claim of privilege and describe the contents of items withheld in response to subpoena).



- c. Documents maintained by or in the possession of an attorney for a college board subject to KORA; documents related to investigation conducted by attorney to provide board legal advice may be closed because they are protected by attorney client privilege. AGO 99-48.
- 2. Records of agencies involved in administrative adjudication or civil litigation compiled in the process of detecting or investigation violations of civil law or administrative rules and regulations.
  - a. Question is whether disclosure would interfere with a prospective administrative adjudication or civil litigation or reveal the identity of a confidential source or undercover agent. K.S.A. 2014 Supp. 45-221(a)(11).
  - b. Investigatory materials become open at the conclusion of the case or once an agency has determined no proceedings will be filed unless another exemption applies. AGO 97-76 (concerning Board of Accountancy complaints).
- 3. Correspondence between a public agency and a private individual. K.S.A. 2014 Supp. 45-221(a)(14).
  - a. Correspondence that is intended to give notice of an agency action, policy or determination relating to any regulatory, supervisory or enforcement responsibility of the public agency or which is widely distributed to the public and not specifically in response to communications from a private individual is open.
  - b. A complaint to a professional licensing board may be closed, but the letter in response to the complaint is open because it is a determination if there is a finding of no probable cause. AGO 97-76.
- 4. Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed. K.S.A. 2014 Supp. 45-221(a)(20); *see also* AGO 2013-5.
  - a. “Deliberative process privilege.” Exemption designed to enhance quality of agency decisions by protecting frank and open discussion among decisionmakers.
    - 1) These provisions “are intended to protect an agency’s internal predecisional deliberations from early disclosure.” Frederickson, *Letting the Sunshine In*, 33 Kan. L. Rev. 205, 249 (Winter 1985).

- b. This exemption does not apply when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting. K.S.A. 2014 Supp. 45-221(a)(20); *see also* AGO 90-14; *and see* K.S.A. 2014 Supp. 45-221(a)(21) and (22) (records of public agency having legislative powers may be closed except here cited or identified in an open meeting or an agenda of an open meeting).
    - 1) Mere announcement of record's name in an open meeting without discussion of its content does not require disclosure of a record otherwise permissibly closed. AGO 90-92.
    - 2) Must disclose records reviewed and discussed during an open meeting or where public body takes binding action on such a record. AGO 92-132 (discussion of amount and method of distribution of a personnel benefit).
  - c. Review of public records during executive session under KOMA does not alter nature of or laws applicable to public record. AGO 95-119.
- 5. Attorney work product. K.S.A. 2014 Supp. 45-221(a)(25); *see also* K.S.A. 60-226(b)(4).
- 6. Exemptions related to bids:
  - a. Specifications for competitive bidding may be closed until the specifications are approved. K.S.A. 2014 Supp. 45-221(a)(27).
  - b. Sealed bids may be closed until a bid is accepted or all rejected. K.S.A. 2014 Supp. 45-221(a)(28); *but see* AGO 2008-3 (insurance rate filings required to be filed with Insurance Commissioner open even though same information may be included in bid or proposal submitted to Committee on Surety Bonds and Insurance pursuant to K.S.A. 75-4125).
- 7. Records concerning prospective location of a business or industry where no previous disclosure has been made. K.S.A. 2014 Supp. 45-221(a)(31).
  - a. Exemption does not apply to records pertaining to applications for permits or licenses necessary to do business or to expand business operations within the state except as otherwise provided by law.
- 8. Contents of appraisals or engineering or feasibility estimates or evaluations made by or for a public agency relative to the acquisition of property, prior to the award of formal contracts. K.S.A. 2014 Supp. 45-221(a)(13).

9. Financial information submitted by contractor in qualification statements. K.S.A. 2014 Supp. 45-221(a)(33); *see also* K.S.A. 60-432, Trade secrets.
  10. Peer review/risk management records concerning certain health care professionals and facilities. K.S.A. 2014 Supp. 45-221(a)(35).
- F. Taxpayer financial information required or requested by county appraiser or director of property valuation to assist in determining value of property for ad valorem taxation purposes, or any financial information of a personal nature required or requested by a public agency or officer, shall not be disclosed unless:
1. Disclosure is otherwise required by law, or
  2. As appropriate during the course of an administrative proceeding or on appeal from an agency action. K.S.A. 2014 Supp. 45-221(b); AGO 89-118 (certificates of value only available to property owners during appeal period).
- G. Redaction is required if public record contains material that is not subject to disclosure. K.S.A. 2014 Supp. 45-221(d); *see also* *Tew v. Topeka Police & Fire Civ. Serv. Comm'n*, 237 Kan. 96, Syl. ¶ 7 (1985) (discussing prior law); *State ex rel. Stephan v. Harder*, 230 Kan. 573, Syl. ¶ 3 (1982) (discussing prior law).
- H. Statistical information not descriptive of any identifiable person is subject to disclosure. K.S.A. 2014 Supp. 45-221(e).
- I. Sunset of closure exemptions. K.S.A. 2014 Supp. 45-229.
- a. Specific closure laws must be reviewed and renewed every five years; otherwise they expire. The next expiration date is July 1, 2014 to July 1, 2016, depending on the section. K.S.A. 2014 Supp. 45-229(b)-(k).

## **VIII. RECORDS THAT ARE MANDATORILY CLOSED**

- A. Some public records are mandatorily closed by federal law, state statute, or Supreme Court Rule. The records custodian has no discretion or choice about whether to provide copies or access.
1. Records custodians possessing such records must be familiar with the laws that apply to records in their possession.
  2. Remember, if the records custodian denies a request for access or copies, K.S.A. 45-218(d) requires the custodian to provide a written citation to the law(s) being relied upon, if that information is requested.
- B. Examples of mandatorily closed records include, but are not limited to:

1. Child in need of care records and reports, including certain juvenile intake and assessment reports. K.S.A. 2014 Supp. 38-2212; *see also* AGO 2004-32 (discussing CINC reports involving child fatality or near fatality).
2. Statewide register of reports, evaluations and assessments concerning abuse, neglect and exploitation. K.S.A. 39-1434.
3. Adoption records. K.S.A. 59-2122; K.S.A. 65-2423; K.S.A. 59-2979(b); and K.S.A. 65-5601 to 65-5605.
4. Juvenile Records.
  - a. Court records closed if juvenile is under 14 and ordered closed by judge. K.S.A. 2014 Supp. 38-2309.
  - b. Records of law enforcement officers or agencies and municipal court records if offense committed or alleged to have been committed by a juvenile under 14. K.S.A. 2014 Supp. 38-2310(a).
  - c. Records concerning victims of sex offenses committee or alleged to have been committed by juvenile. K.S.A. 2014 Supp. 38-2310(c).
  - d. Juvenile intake and assessment records. K.S.A. 2014 Supp. 38-2310.
5. Individually identifiable drug abuse treatment records. AGO 2011-05.
6. Criminal history record information in possession of law enforcement agency. K.S.A. 22-4701 *et seq.*; K.S.A. 22-4707; K.A.R. 10-12-2 (conviction information is in some circumstances open, nonconviction information is closed.)
7. Unexecuted search or arrest warrants. K.S.A. 2014 Supp. 21-5906.
  - a. Affidavits and sworn testimony given to obtain such a warrant are closed except as to the defendant or as otherwise ordered by the court. K.S.A. 22-2502(c); AGO 87-100. (It is a crime to disclose an unexecuted warrant, but this does not apply to personnel of a law enforcement agency disclosing a search warrant: (1) For the purpose of encouraging the person named in the warrant to voluntarily surrender; or (2) issued in a case involving the abduction of a child unless such disclosure is specifically prohibited by the court issuing such warrant).
8. Presentence and diagnostic reports. K.S.A. 2014 Supp. 21-6704.
9. Grand jury proceeding records. K.S.A. 22-3012.

- a. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the prosecuting attorney for use in the performance of his/her duties.
10. Presentence report, the preparole report, the pre-postrelease supervision report and the supervision history. K.S.A. 2014 Supp. 22-3711; *but see Wichita Eagle and Beacon Pub. Co., Inc. v. Simmons*, 274 Kan. 194 (2002).
11. Crime Victims Compensation Board – all records and information given to the Board are confidential. K.S.A. 74-7308(e).
  - a. Disclosure possible in the event of an appeal under KAPA, but only to extent necessary to obtain court review. K.S.A. 74-7308(e)(1).
  - b. Disclosure possible on a strict showing to court in a separate civil or criminal action that particular information or documents not obtainable after diligent effort from independent source and are known to exist only in board records; court may conduct *in camera* inspection; court may release only if it finds release will not pose any threat to the safety of the victim or any other person whose identity may appear in board records. K.S.A. 74-7308(e)(2).
  - c. By any board order granting or denying compensation to a crime victim. K.S.A. 74-7308(e)(2).
12. Racing Commission criminal and background checks; unlawful disclosure is a class A misdemeanor and grounds for removal from office, termination of employment or denial/suspension of any license issued under act. K.S.A. 2014 Supp. 74-8804(o).
13. Convictions for violating a maximum posted speed limit of 55 miles per hour or more but not exceeding 75 miles per hour, by not more than 10 miles per hour in excess of such maximum speed limit. K.S.A. 2014 Supp. 8-1560d.
14. Mentally ill persons' commitment and treatment records. K.S.A. 2014 Supp. 59-212; K.S.A. 2014 Supp. 59-2979 (willful disclosure a class C misdemeanor).
15. All information, records and reports received or developed by an ombudsman or volunteer concerning long-term care facility residents' information. K.S.A. 2014 Supp. 75-7310.
16. Peer review records. K.S.A. 2014 Supp. 65-4915(b).
17. Ballots. K.S.A. 2014 Supp. 25-2422. However, election petitions are open. AGO 97-22.

18. Social security numbers under some circumstances. K.S.A. 2014 Supp. 75-3520; *see also* 5 U.S.C. §552a note.
19. Income tax reports and returns. K.S.A. 2014 Supp. 79-3234(b).
20. Kansas Department of Health and Environment vital statistics – marriage, birth and death certificates. K.S.A. 2014 Supp. 65-2422d.
21. Kansas Human Rights Commission shall not disclose what transpired in conciliation matters. K.S.A. 2014 Supp. 44-1005; K.A.R. 21-43-6.
22. Certain student information or educational records. 20 U.S.C. §1232g.
23. Reports of contagious disease. K.S.A. 2014 Supp. 65-118.
  - a. May disclose if no identifiable information and disclosure is for statistical purposes. K.S.A. 2014 Supp. 65-118(c)(1).
  - b. May disclose where identifiable persons consent in writing. K.S.A. 2014 Supp. 65-118(c)(2).
  - c. May disclose if necessary, and only to extent necessary to protect public health. K.S.A. 2014 Supp. 65-118(c)(3).
  - d. May disclose if medical emergency exists and disclosure is to medical personnel qualified to treat infectious or contagious diseases, but only to the extent necessary to protect the health or life of a named party. K.S.A. 2014 Supp. 65-118(c)(4).
  - e. May disclose if the information is required in a court proceeding involving child abuse and the information is disclosed *in camera*. K.S.A. 2014 Supp. 65-118(c)(5).

## IX. ENFORCEMENT

- A. Any public agency that “knowingly” violates KORA provisions or intentionally fails to furnish information as required by act shall be liable for the payment of a civil penalty in sum not to exceed \$500 for each violation. K.S.A. 45-223(a).
  1. Cases seeking a civil penalty may only be brought by attorney general or county/district attorney. K.S.A. 45-223(a).
- B. Procedure
  1. Enforcement action may be brought by any person, the attorney general or a county/district attorney. K.S.A. 2014 Supp. 45-222(a).

- a. Venue is the district court of any county in which the public records are located. K.S.A. 2014 Supp. 45-222(a).
  - b. No cause of action if records are located out of state. *Altevogt v. Youth Friends*, 29 K.A.2d 473 (2001) (Kansas resident sought records concerning himself from Missouri corporation with no Kansas offices; records concerning plaintiff all located in Missouri).
  - c. “The burden of proving an exemption from disclosure is on the agency not disclosing the information.” *State Dept. of SRS v. Public Employee Relations Board*, 249 Kan. 163, 170 (1991).
2. Court reviews matter *de novo*, and may on its own motion, or the motion of either party, review records *in camera* before reaching a decision. K.S.A. 2014 Supp. 45-222(b).
  3. Attorney general or county/district attorney may issue subpoenas, take testimony under oath, examine relevant documentary material, require attendance and take testimony under oath concerning any such documentary materials, and serve interrogatories. K.S.A. 45-228(a) – (e).
  4. Civil remedies to enforce act.
    - a. Court may enforce purposes of KORA through injunction, mandamus or other appropriate order. K.S.A. 2014 Supp. 45-222(a); *see also Willis v. Kansas Highway Patrol*, 273 Kan. 123 (2002).
  5. Enforcement actions shall be assigned for hearing and trial at the earliest practicable date. K.S.A. 2014 Supp. 45-222(e).
- C. Penalties are civil, not criminal in nature. K.S.A. 45-223(a); *see also Telegram Pub. Co. Inc., v. KDOT*, 275 Kan. 779 (2003).
1. Civil penalties recovered by attorney general paid to state general fund; civil penalties recovered by county/district attorney paid to general fund in county where proceedings instigated. K.S.A. 45-223(b).
  2. Costs and attorney fees.
    - a. Court “shall” award costs and reasonable attorney fees against defendant if it finds agency’s denial of access to the public record was not in good faith and without a reasonable basis in law or fact; includes appeal proceedings. K.S.A. 2014 Supp. 45-222(c).
      - 1) Award assessed against the public agency court determines responsible for the action.

- a. Court “shall” award costs and reasonable attorney fees against plaintiff if the action was not in good faith and without a reasonable basis in law or fact; includes appeal proceedings. K.S.A. 2014 Supp. 45-222(d).

## **X. 2015 LEGISLATIVE CHANGES**

- A. HB 2256 – enrolled May 22, 2015, and effective July 1, 2015.
  1. Predominantly a process bill.
- B. Creates graduated enforcement options to encourage resolution of KORA violations in lieu of filing an enforcement action.
  1. Consent judgment – can be utilized by attorney general, county or district attorney. New Section 2.
  2. Consent order and finding of violation – utilized by attorney general. New Section 1.
    - a. Establishes preponderance of the evidence standard. New Section 1.
  4. Establishes a mechanism to enforce out-of-court settlements and findings of violation through judicial review. New Section 1.
    - a. Venue in the county where consent order or finding of violation is issued or is effective. New Section 1.
- C. Training.
  1. Expressly authorizes either the courts or the attorney general to require that persons who violate KORA undergo training and provide proof they have satisfied this requirement. New Section 1.
  2. Subject to availability of appropriations, the attorney general may provide and coordinate training throughout the state to promote knowledge of and compliance with KORA. New Section 8.
  3. Authorizes attorney general to review and approve training programs to permit uniformity in training; qualified training programs can obtain a “stamp of approval.” New Section 8.
  4. Authorizes attorney general to establish a system of online training to help make training widely available. New Section 8.
- D. Investigations.



1. Establishes mechanism to enforce investigative demands, such as subpoenas. Section 13.
  2. Confidentiality – makes clear that any assertion of confidentiality by the alleged violator must be respected by the prosecutor, who may not release the records received during the course of an investigation without a court order. Section 13.
- E. Complaint form.
1. Requires requests for investigation submitted to the attorney general be submitted under penalty of perjury on a form approved by the attorney general. New Section 3.
- F. Investigation costs and fees.
1. Permits the state to recover reasonable investigation costs and attorney fees. New Section 1.
  2. Costs, fees, expenses and penalties recovered by the attorney general deposited in newly created open government fund to support purposes of KOMA and KORA, including training and enforcement actions. New Section 7.